UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
LARRY J. CALHOUN,	)	CASE NO. 04-32269 HCD
DEBTOR.	)	CHAPTER 7
	)	
MICHAEL WAGONER, LINDA WAGONER,	)	
TRAVIS SKIDMORE, ANGEL SKIDMORE,	)	
RODNEY UTTER, and VICKI UTTER,	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 04-3121
	)	
LARRY J. CALHOUN,	)	
DEFENDANT.	)	

Appearances:

C. Richard Oren, Esq., counsel for plaintiffs, P.O. Box 532, Rochester, Indiana 46975; and

Alan D. Burke, Esq., counsel for defendant, 113 East Tenth Street, Rochester, Indiana 46975.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 1, 2005.

Before the court are the Complaint Objecting to Discharge, filed on September 27, 2004, by the plaintiffs Michael Wagoner, Linda Wagoner, Travis Skidmore, Angel Skidmore, Rodney Utter, and Vicki Utter ("plaintiffs") and the Answer to that Complaint filed by the defendant debtor Larry J. Calhoun ("defendant") on November 30, 2004. Trial on the Complaint was held on March 15, 2005. For the reasons that follow, the court grants the Complaint and denies the discharge of Larry J. Calhoun.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and

1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The plaintiffs, Michael and Linda Wagoner, Travis and Angel Skidmore, and Rodney and Vicki Utter, are creditors of the debtor-defendant Larry J. Calhoun. In their Complaint, they claimed that the defendant, within one year of filing his bankruptcy petition, and with intent to hinder, delay, or defraud creditors, transferred approximately twelve parcels of real property located in Fulton County, Indiana, having a market value of approximately $2,142,800 and having equity exceeding $1,000,000.

The defendant, in his Answer to the Complaint, admitted that, within one year prior to the filing of his bankruptcy petition, he transferred parcels of real estate located in Fulton County. However, he denied that he made any transfer with intent to hinder, delay, or defraud creditors. As an affirmative defense, he stated that he transferred the real estate in compliance with orders to transfer the real estate issued by the Marshall Circuit Court.

At the trial on the plaintiffs' Complaint, held on March 15, 2005, the only witnesses were the defendant Larry J. Calhoun ("the defendant" or "Larry") and his former spouse Gloria Jean Calhoun ("Gloria"). The parties' exhibits were admitted in evidence without challenge, and most of the underlying facts presented in the trial testimony were uncontested, as well.

Larry J. Calhoun lives in Rochester, Indiana. He has been a self-employed businessman since 1964. He owned and managed two restaurants in Rochester, the Streamliner Junction and Streamliner Central. He testified that he was pretty successful with his first venture, "the Junction," which he purchased in 1964. He then bought the second restaurant and called it "Streamliner Central" or "the Central." The two restaurants are treated

as one business for tax purposes. He bought numerous other real estate holdings, as well; some he owned jointly with his former wife, and others he held in his own name. He borrowed money on the real estate mortgages, their life savings, their life insurance policies, and all their assets, and invested it in the stock market. He even borrowed money from family and friends. "When Enron happened," he testified, he was heavily invested in speculative investments; he "bottomed out" when the stock market "bottomed out."

The plaintiffs are friends from whom he borrowed money. Because he could not repay them, they now are creditors in his bankruptcy, holding judgments in their favor that were issued by the Fulton Circuit Court on December 9, 2003. The Wagoners originally lent him $75,000.00; they now hold a judgment against him for $18,292.60. The Skidmores lent him $20,000.00, and their judgment is in the amount of $3,730.35. The Utters' loan to him was for $15,000.00, and their judgment against him is for $2,367.31.

The defendant presented a bleak time-table of events. The plaintiffs filed suit against him on February 20, 2003. His wife petitioned for a divorce shortly thereafter, on February 26, 2003. The Decree of Dissolution of their marriage was entered on July 11, 2003, and the creditors obtained judgments against him on December 9, 2003. He filed his bankruptcy petition on April 23, 2004.

The defendant testified that he and Gloria reached an amicable resolution in their dissolution proceeding. *See* Pl. Ex. F, Decree of Dissolution and Marriage Settlement Agreement. They agreed to transfer virtually all the real estate assets to Gloria: their marital residence; the two Streamliner restaurants; the apartments on East Ninth Street in Rochester; vacant lots numbered 3, 6, 7, 27, 28, and 31; and 8.3 acres on College Street. The only real estate retained by Larry was two University Addition lots that he later valued in his bankruptcy schedules at $1,000 each. Under the Agreement, Gloria also received the proprietorship of the two restaurants, the LPL stock account, 300 shares of First Federal stock, eight insurance policies, and the savings account at Wells Fargo Bank. She kept her personal belongings and was given the marital residence, all the furniture (except the antique dining room table and chairs), the 1992 Chrysler New Yorker and 1996 Dodge van. Larry kept the savings account at First Source Bank, his personal belongings, the antique dining room set, and the 1996 Dodge

truck. Gloria agreed to continue to employ Larry in the restaurant business, to assume all the business debt, and to hold Larry harmless from liability on that debt. The defendant conceded, and the Agreement stated, that the decree was an unequal division of marital assets: "The parties specifically acknowledge the distribution herein is not equal, but both agree is fair and equitable under the circumstances." Pl. Ex. F, Agreement at 3. The reason, according to the Agreement, was that, during the marriage, the defendant-husband dissipated the assets of the marriage. Although it was not written into the Agreement that Larry would remain living in the marital residence, he in fact continued to live there with Gloria and was living there at the time of the trial. "It's a big house," he said. He stated that he never separated from Gloria because it didn't make sense financially.

On July 14, 2003, three days after the dissolution had been issued, the defendant released, by quitclaim deed, all his interest in his real estate to Gloria. In December, 2003, Gloria transferred three lots, one to each of their three children. The lots each were worth $20,000-$22,000 and had no liens on them. On December 26, 2003, Gloria refinanced the home mortgage. She alone signed the mortgage at First Federal Savings Bank, but she and Larry together executed the note promising to pay the $227,500 owed under the mortgage. The defendant explained that Gloria, the only one with an interest in the property, signed the mortgage but that the bank required both their signatures on the note. He admitted that he could not repay the bank and that he was not obligated to sign the note under the property settlement agreement. When he was reminded that he had been a businessman since 1964 and knew well that, if he signed a promissory note, he was expected to pay it, he replied: "That's not the way it was explained to me." He denied that he executed the note because he wanted to continue living in the marital residence with Gloria.

The defendant filed his petition in bankruptcy in April 2004. He did not reaffirm the residential mortgage debt to First Federal Savings Bank or the restaurant mortgage debt to Farmers State Bank. He testified that Gloria was making the payments to the banks. He had no way of repaying that debt, he said, but he intended to work in the business, managing the restaurants, so that Gloria could continue to pay the debt. He testified that

he and Gloria did not tell people that they were divorced. "It wasn't a secret," he explained, "but it wasn't general knowledge." He further noted, "We just tried to continue with business the best we could."

He and Gloria together renewed the First Source Bank promissory note in the amount of $24,342.69, which was secured by Gloria's lot in the Schoolview Addition. *See* Pl. Ex. J. Although he was no longer married to Gloria, they both signed the note and did not tell First Source Bank that they were divorced. He knew that he had no obligation under the property settlement agreement to sign that note. Nevertheless, he testified that, even though Gloria owned the property after he deeded it to her, he believed that he still was liable on the debt.

The defendant listed his daughters Lisa and Deborah (together with her husband) and his daughter-in-law Brooke as unsecured creditors in his bankruptcy. The debt to Lisa, he explained, was based on the $10,000 loan she made to the restaurant in October 2003. However, in October 2003, the defendant acknowledged, he did not have any interest in the business, because he had transferred his interest to his former wife in the divorce settlement. When he was asked why he had listed Lisa's loan as his personal debt when it was actually a loan to the business, he said he didn't know.

The defendant has continued to manage the Streamliner restaurants and to help Gloria promote her business ventures. She participates in a networking business called Quickstar, a business owned by the multi-billion-dollar company Alticorp. The defendant suggested that it is "like a sister" to Amway, but different, too. He described it as a fulfillment center, like a big warehouse – someone puts in an order and it sends out the ordered products, he explained. He is involved in it from a management point of view; he gets no compensation, but he travels with her to other cities for meetings and promotions. They also are involved together in I-Teamchoice, the promotional arm of QuickStar and its products. The I-Teamchoice business cards, ordered from the company's web site, were printed in the standard company format. The defendant wanted his name to be listed separately, with the title of "Manager," he said, but they printed it as "Larry J. Calhoun, Gloria J. Calhoun" instead. The business cards are displayed in their restaurants for customers to take.

The defendant prepared financial statements along with his joint tax returns (filed before the divorce) for 1999 through 2002. *See* Pl. Exs. B, C, D, E ("Larry & Gloria Calhoun Individual Year-End Return & Year-End Statements for the Period Ending 12/31/1999," etc.). At trial, he focused on his 2002 financial statement and, in particular, on the valuations and loan balances for each piece of real estate – personal, investment, and business property – he owned. *See* Pl. Ex. E, Schedule 1. The defendant explained that the "present value" he listed for each property usually was not an appraised value but rather was his "best guess" or best estimation of its value. His valuation was based upon having an extended time for the sale, a good real estate market at the time of the sale, and an interested buyer. He signed his name to each year's year-end statement under the following attestation:

> To obtain or maintain credit on my signature, I certify this financial statement and schedules represent a true and accurate accounting of our financial condition as of the date indicated.

Pl. Ex. E, p. 1. He testified that, as of December 31, 2002, the valuations listed in the financial statement were accurate, but added that he might not be able to sell the property for that much money.

On cross examination, the defendant was asked to review and compare the values he had listed on Schedule 1 of his year-end financial statements. He had stated that his home's value at the end of 2002 was $312,000. In 2001, he listed the value at $300,000; in 2000, it was valued at $298,000; and in 1999 it was valued at $260,000. He explained that he had arrived at those values on his own. He had been involved in real estate, he said, and knew from his discussions with real estate brokers that, even in depressed times, the increased value of real property annually in Rochester, Indiana, was around 4%. He acknowledged, though, that from 2000 to 2001 the increase was only 1/2%. When explaining the increase of more than 11% between 1999 and 2000, the defendant stated that a certified appraisal of his home in April 2000 had valued it at $260,000, but he thought it was worth more. When he estimated the value of the home in December 2000, therefore, he had raised the value to $298,000. However, he admitted that it was his best guess. In his view, any real estate valuation is a best guess. The defendant also explained the increased value in the undeveloped lots on College Street. He stated

their worth in 1999 at $100,000 each, but valued them at $150,000 in 2000, 2001, and 2002. He increased the value 50% because he had found a potential purchaser. He set the price for the property based on the best scenario, but in the end the properties did not sell.

The value of the Streamliner Central Restaurant was listed on the 2002 financial statement at $1,021,300. *See* Pl. Ex. E, Schedule 1. The defendant said that it had been appraised at $760,000 in or around the year 2000. However, his valuation at the end of 2002 was based on what it takes to sell the restaurant: He started with the gross income earned by the restaurants ($920,667 in gross receipts for the two restaurants), and added $100,000 or more to that figure, to arrive at the value of $1,021,300, because, to sell it, he had to list it higher than he expected to get for it. He also explained that the value of the Streamliner Junction, listed at $385,000, was calculated by considering the perfect condition of the business, a good market, and an interested buyer. He said that he valued Junction at more than twice its local sale valuation because the area around the restaurant was being developed and because there was a parcel available next door to the restaurant. However, he noted that the restaurants' gross receipts are down and that the value of the properties has deteriorated over time, and he has been unable to sell them. Some people were talking about buying the Junction for around $200,000-$250,000, and Gloria even listed it at $200,000-$250,000. However, she never got an offer.

The defendant testified that he has always used the same accountant to file his tax returns. The accountant did not challenge his figures, and so he must not have thought they were terribly inflated. The defendant admitted that his "present values" figures were optimistic, however.

Describing his present financial circumstances, the defendant testified that their home is fully mortgaged and that Gloria could not get credit now. If Gloria tried to sell the home, he estimated that she might get $160,000-$175,000 for it. He stated that he had no animosity toward Gloria, and that she pays him $250 a week and gives him a place to live. He estimated that, if he liquidated his real estate assets, he might get $15,000 for each of the Schoolview lots. He does not know what he could get for the lots on College Street. He guessed that, if he had to liquidate everything, he probably would get $50,000-$60,000. The Streamliner Central property,

if sold within a year to a qualified buyer, could get perhaps $750,000-$800,000. If the bank repossessed it, he thought it could sell the restaurant for perhaps $600,000. He believed that, when Gloria filed for divorce, the assets of real estate were worth about the same amount as the debt that was owed on them.

During re-direct examination, the defendant insisted that he was not just picking value figures out of the air. In his view, because of his experience in real estate, he thought he had increased the value of certain properties from year to year in an educated, reasoned manner. He signed the financial statement form believing that the figures were true and accurate. Because he valued property assuming perfect selling conditions and an interested buyer, they were optimistic figures, he admitted; but the accountant signed the form too, and therefore he must have thought they were correct and not overinflated.

When the defendant was asked whether his desire for Gloria to survive financially was a big motive in transferring the properties to her, he gave an animated response:

> I basically lost everything that we had worked 40 years to acquire. I had lost, (pause) well, Enron happened, and Ken Lay is still out there and hasn't even been to trial, OK? I could not control that, along with several other multi, multi-million-billionaires that lost everything that they had also, along with the 20,000 other people that lost everything that are not getting anything for it. . . . We lost it all. So, whatever there was left, you bet I was willing to transfer to her. She had every right to get a divorce, as far as I was concerned, why wouldn't she?

He then was asked: "So, if I'm understanding you correctly, you transferred these properties to Gloria so that the rest of the property that you and she owned together wouldn't be lost to your creditors at that time. Is that correct?" The defendant responded: "There was nothing to lose. If we had to sell everything, there wouldn't have been anything left. She took all the debt. Bottom line is, there wasn't anything there, and less there now than there was then."

The defendant testified that he prepared the financial statements at the end of 2002 in good faith and in consultation with his accountant. When he reviewed the 2002 statement in court, listing total real estate assets of $2,142,800; total assets of $2,300,411; total liabilities of $1,780,693; and a net worth of $519,719, he was asked to confirm that he has more than $500,000 in equity. He responded that he would have that equity only

if, under perfect conditions, he could sell the property to the qualified perfect buyer in the best condition, but that would not happen. He further explained:

> Those financial statements were basically made out to look as good as we can make them look when we take them to the bank to borrow money on them, and we borrowed all we could borrow. And when I say we, I mean me.

He emphasized that Gloria now owns all the property, he manages the business, and he doesn't have the assets to do anything else. He conceded that he always had made the investment decisions in the family and that Gloria had had confidence and trust in him.

Gloria Jean Calhoun's testimony confirmed her former husband's testimony in all respects. She agreed that the divorce was a quick, amicable settlement, reached in a very short period of time, and that the defendant quickclaimed virtually all his assets to her in the agreement. She stated that she transferred three of the Schoolview lots to their children by warranty deed so that the children could use the lots as collateral to obtain loans for the restaurant business. According to Gloria, her former husband was basically a business associate of hers now. She admitted that she allowed him to manage their restaurants and business assets, and to work in the Quickstar and I-Teamchoice marketing businesses, even though he had made business decisions that lost most of their assets. She also conceded that the Streamliner restaurants were running at a deficit because they had so many loans on the business and because the income from the restaurants has been declining over all these years.

Discussion

The plaintiffs ask the court to deny the debtor a discharge in his chapter 7 bankruptcy. Section 727 of the Bankruptcy Code requires a bankruptcy court to grant a discharge to a chapter 7 debtor unless one of the ten exceptions listed in § 727 is proven. Consistent with the Code's "fresh start" policy, courts have required that "exceptions to discharge should be construed strictly against the creditor and liberally in favor of the debtor." *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996). Nevertheless, courts also have recognized that a debtor's discharge "is not a right, but a privilege." *Union Planters Bank, N.A. v. Connors*, 283 F.3d 896, 901 (7th Cir.

2002). "Thus, consistent with the Code, bankruptcy protection and discharge may be denied to a debtor who was less than honest." *Village of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002).

Although the plaintiffs did not cite to the exception of § 727 on which they relied, their complaint clearly set forth allegations that the debtor violated subsection (a)(2)(A) of the statute, which provides:

> The court shall grant the debtor a discharge unless . . . the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A). To prevail, the plaintiffs are required to prove that (1) the debtor, Larry J. Calhoun, (2) transferred (3) the debtor's property, (4) with the intent to hinder, delay, or defraud a creditor (5) within one year of bankruptcy. *See In re Kontrick*, 295 F.3d 724, 736 (7th Cir. 2002), *aff,d*, 540 U.S. 443 (2004). The plaintiffs have the burden of proving all the elements of § 727(a)(2)(A) by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L.Ed.2d 755 (1991); *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir.1999).

The parties agree that the defendant transferred his property to his former wife Gloria in the divorce property settlement agreement within one year of filing bankruptcy. *See Owensboro Nat'l Bank v. Gipe (In re Gipe)*, 157 B.R. 171, 176 (Bankr. M.D. Fla. 1993) (finding that the record and debtor's admissions left no doubt that the debtor transferred most of his assets to his ex-spouse and thus was left insolvent within one year of the bankruptcy). The defendant does not question that the allocation of property under the decree of dissolution constitutes a transfer, as it is defined under § 101(54) of the Bankruptcy Code, and this court is in full agreement with Judge Sonderby, of the United States Bankruptcy Court for the Northern District of Illinois, that property transfers under a divorce decree or property settlement agreement may be challenged by the bankruptcy trustee or by creditors. *See Fogel v. Chevrie (In re Chevrie)*, 2001 WL 120132 at *10 (Bankr. N.D. Ill. 2001) (unpublished opinion) (citing cases). The court finds that the plaintiffs have satisfied the statute's prerequisites concerning the debtor's act of transfer within one year of bankruptcy. The issue before the court is whether the debtor acted with the improper intent of defrauding his creditors. *See Kontrick*, 295 F.3d at 736 ("§ 727(a)(2)(A)

makes it clear that a debtor may not divest himself of property with the intent to hinder, delay or defraud his creditors and still receive a discharge.").

The court reviews the totality of the circumstances surrounding the transfer of marital assets to see if there is sufficient evidence to permit the conclusion that the debtor had attempted to evade payment to his creditors. *See McWilliams*, 284 F.3d at 790-91. In *McWilliams*, the Seventh Circuit Court of Appeals followed the Fifth Circuit's list of factors indicating fraudulent intent:

> (1) the lack or inadequacy of consideration;
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> (2) the family, friendship or close associate relationship between the parties;
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> (3) the retention of possession, benefit or use of the property in question;
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> (4) the financial condition of the party sought to be charged both before and after the transaction in question;
>
> (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and
>
> (6) the general chronology of the events and transactions under inquiry.

Id. (citing *Pavy v. Chastant (In re Chastant*), 873 F.2d 89, 91 (5th Cir.1989) (citation omitted)). A defendant's intent can be shown by circumstantial evidence or from inferences drawn from a debtor's course of conduct. *See McWilliams*, 284 F.3d at 790; *In re Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992). Once a plaintiff demonstrates one or some of these factors, there arises a presumption of an intent to defraud; the burden then shifts to the defendant to show that he lacked the intent to hinder, delay, or defraud the plaintiff. *See McWilliams*, 284 F.3d at 791. The courts consider a debtor's transfer of property to a spouse to be a "classic badge of fraud." *Rogers v. Boba (In re Boba)*, 280 B.R. 430, 435 (Bankr. N.D. Ill. 2002) (finding that "an agreed transfer of property to a spouse through a fast-track divorce on the eve of bankruptcy is evidence of a fraudulent scheme to put the property beyond reach of creditors") (citing *In re Chevrie*, 2001 WL 120132 at * 10).

In this case, the Property Settlement Agreement states, and the defendant admits, that there was an unequal distribution of the marital assets: Gloria received the defendant's interest in the marital residence, ownership of the two restaurants, all the real estate holdings except two lots, the vast majority of investment assets, and most of the personal property. The plaintiffs insist that this unbalanced transfer of assets to Gloria was done in order to "impoverish" the defendant. R. 15 at 2. In the view of the plaintiffs, "the dissolution was in fact merely a 'sham' divorce." *Id.* To prove the sham, they point out that the evidence demonstrated that the defendant continues to reside with his former spouse in the marital residence; he continues to manage the restaurants that he had owned during their marriage and had transferred to his former wife in the property settlement; and he continues to travel with his former spouse and to engage in new business ventures with her. In addition, the former wife transferred unencumbered real estate to their children, who are creditors in the defendant's bankruptcy. The plaintiffs claim that the transferred assets represented equity interests that were sufficient to pay all the unsecured creditors listed in his bankruptcy.

The court finds that the plaintiffs have shown numerous indicia of fraud. Gloria's initiation of divorce proceedings began six days after the plaintiffs had filed suit against the defendant. The defendant transferred almost all of his assets to his former wife, in the course of their amicable and relatively quick divorce, and she in turn transferred some property to their children. The transfer, a planned inequitable distribution of the assets, terminated his interest in real estate and other assets and rendered him insolvent. Despite the divorce, the defendant remained living with Gloria in the marital home, working with Gloria in the restaurants, managing Gloria's business ventures, and traveling with her. He signed promissory notes with Gloria for property he had transferred to her. He did not tell First Source Bank of the divorce when they both signed the note to refinance the house Gloria now owns. In fact, he tried to keep his divorce quiet, he testified. The major change in his life, since his divorce, he agreed, was that he no longer has assets.

The court considered the debtor's course of conduct in light of such decisions as *MWI Veterinary Supply Co. (In re Rodgers)*, 315 B.R. 533, 541-43 (Bankr. D.N.D. 2004) (finding that the court "is simply not

convinced the divorce was a 'sham'") and *In re Boba*, 280 B.R. at 434-46 (finding that the transfers in the divorce "showed a deliberate intent to shield his assets from creditors"). It reviewed the evidence and testimony proffered at trial and observed the demeanor of the witnesses.[1] It now finds that the plaintiffs have demonstrated, though actual and circumstantial evidence and from the defendant's course of conduct, several of the factors indicating fraudulent intent. In the view of the court, the former spouses' continuing close relationship, along with the defendant's use and benefit of the transferred home and businesses and his management of Gloria's business ventures, support the plaintiffs' theory that the defendant and Gloria intended to defraud their creditors by divorcing and agreeing to transfer most or all of the assets to Gloria. *See In re Boba*, 280 B.R. at 434-35. Such conduct is evidence of fraud under § 727(a)(2)(A) and also evidence of a collusive divorce. The court finds that the plaintiffs succeeded in their burden of establishing a presumption of fraudulent intent.

The burden therefore shifted to the defendant to show that he had no intent to defraud. The defendant presented two defenses concerning his transfer of the marital assets to his former wife: (1) the transfer was made at the direction of the court in the dissolution decree, and (2) the value of the assets was approximately equal to the debt thereon at the time of the transfer, such that no harm was done to these creditors.

The defendant correctly stated that the Marshall Circuit Court approved the agreement between Larry and Gloria Calhoun settling their property rights. The law in Indiana encourages the use of property settlement agreements in dissolution of marriage cases. *See Myers v. Myers*, 560 N.E.2d 39, 44 (Ind. 1990). Spouses unable to maintain a marriage are allowed to craft financial arrangements and to settle property disbursements in a conciliatory agreement. *See id.* Courts enforce such agreements "[i]n the absence of fraud, duress, or undue

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[1] The court noted that the defendant spoke in a flat, unmodulated tone until he testified with emotion that he had lost everything, that he was willing to transfer to Gloria whatever was left, and that "she had every right to get a divorce." *Infra* p. 8. He often referred to the assets transferred to Gloria as "his" or "their" assets. His attempts to explain his methods of valuing property were implausible and at times not credible. For example, he stated that, although the appraised value of the marital home was $260,000 in April 2000, he reported its value to be $298,000 in December 2000 and $312,000 in December 2002. He also testified that Gloria would be able to sell it now, in 2005, for only $160,000-$175,000. Such wide variations in these valuations cause the court not to treat them as "a true and accurate accounting" of his financial condition.

influence." *Smith v. Smith*, 547 N.E.2d 297, 300 (Ind. App. 1989); *see* Ind. Code § 31-15-7-9.1 (Property disposition orders "may not be revoked or modified, except in case of fraud."). In this case, however, the property settlement agreement was reached shortly after the plaintiffs filed suit against the defendant and shortly before the defendant sought bankruptcy protection. *Cf. Harman v. Sorlucco (In re Sorlucco)*, 68 B.R. 748, 755 (Bankr. D.N.H. 1986) ("Settlements reached in the shadow of an imminent bankruptcy filing would raise a clear factual question as to the bona fides of such [arms-length] bargaining.") (cited with approval by *Webster v. Hope (In re Hope)*, 231 B.R. 403, 416 (Bankr. D. D.C. 1999) (finding that divorce decree was not collusive, was not intended to defraud creditors)). In addition, a presumption of the defendant's intent to defraud has been shown. Finally, since it is clear that the defendant chose to transfer his assets to Gloria, he cannot now assert that he transferred them because the state court ordered him to do so.

The defendant's second contention is that the value of the assets was approximately equal to the debt on those assets when they were transferred. The valuations on which the defendant relied were presented in the 2002 year-end financial statement, which was completed two months before Gloria filed for divorce and six months before the decree was issued. It indicated that he held real estate assets worth $2,142,800. He listed his total assets to be $2,300,411 and his total liabilities to be $1,780,693. He calculated his net worth at $519,719. On Schedule 1 of that statement, the debt or "present loan balance" on each and every piece of property was less than the equity or "present value" of the property. The defendant presented self-serving explanations that his real estate values were optimistic, were based upon ideal selling conditions and a ready and willing purchaser, and were "made out to look as good as we can make them look when we take them to the bank to borrow money on them." *Infra* p. 9. The court finds the defendant's values inflated and not worthy of credibility. Nevertheless, the defendant signed the statements certifying that they were true and accurate and he testified that he prepared them in good faith and in consultation with his accountant, and this court will hold him to those statements. The court finds, on Schedule 1, that the value of the defendant's assets was greater than the debt owed on those assets. Contrary to the defendant's position, therefore, there was a net worth of $519,719 from which judgment creditors

could be paid. In the Marriage Settlement Agreement, the defendant admits that he borrowed from friends and squandered large sums of money in risky investments. The Agreement states: "In order to be fair to Wife, Husband will take responsibility for the lost investments." The court finds that he did not take responsibility for them; instead, he transferred his assets to his wife and then filed bankruptcy in order to discharge those "lost investment" debts.

The court finds, finally, that the defendant cannot succeed on his last argument that no harm was done to these creditors. The defendant's own financial statements reveal that there is equity available for payments to judgment creditors, and the court determines that they have been harmed by being required to bring suit against him in state court and in bankruptcy court in order to obtain repayment of their loans to him. More importantly, however, a discharge may be denied under § 727(a)(2) without any proof that the creditors suffered harm. All that is required is that the defendant debtor had the requisite intent to defraud. *See McWilliams*, 284 F.3d at 793 ("Even if the Village did not suffer any harm, the McWilliams' intent to defraud is all that is needed for a petition to be denied under section 727(a)(2).") (citing cases).

In conclusion, the court finds that the defendant was unable to rebut the presumption of fraud. By transferring property to his former wife in the property settlement agreement, he divested himself of property from which judgment creditors could collect on their judgments. Once he put those assets beyond the reach of creditors, he then continued to live in the marital residence and to use the restaurants and other assets for his own benefit. After considering the totality of the circumstances, the court finds that the defendant transferred property to his wife with the intent to defraud his creditors within one year of filing for bankruptcy, in violation of § 727(a)(2)(A). As a result, the defendant's discharge must be denied.

Conclusion

For the foregoing reasons, the Complaint of the plaintiffs is granted and the discharge of the defendant debtor is denied pursuant to 11 U.S.C. § 727(a)(2)(A).

SO ORDERED.

JSO1

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT